IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	
Appellee,	)	No. 07-1712
vs.	)	
JOHN HERKLOTZ, an individual,	)	
Appellant	)	

MOTION FOR *NUNC PRO TUNC* CERTIFICATION THAT ENTRY OF JUDGMENT DATED FEBRUARY 8, 2008 APPLIES TO THE ENTRY OF JUDGMENT DATED FEBRUARY 20, 2007 PURSUANT TO F.R.C.P. 54(b)

AND NOW comes, Defendant John C. Herklotz, by and through his counsel, BURNS, WHITE & HICKTON, LLC and John P. Sieminski, Esquire, and files this Motion for *Nunc Pro Tunc* Certification that the Entry of Judgment dated February 8, 2008 applies to the Entry of Judgment dated February 20, 2007, and avers as follows:

1. Plaintiff WRS brought this action against Defendant Herklotz, seeking to hold him liable under a personal guaranty signed by Herklotz May 6, 1998.

2. The allegations arose from Herklotz's status as a surety for the business relationship between WRS and Plaza Entertainment, Inc. (hereinafter, "Plaza").

3. Following the filing of cross Motions for Summary Judgment by WRS and Herklotz, this Court, by the Honorable Arthur J. Schwab, issued a decision on the issue of Herklotz' liability, holding that Herklotz, as a compensated surety, was obligated to WRS for the debt of Plaza pursuant to the surety agreement signed May 6, 1998.

4. On February 20, 2007, Judge Schwab issued an Order based upon WRS' Motion for Summary Judgment as to Damages, entering a judgment against Herklotz in the amount of $2,584,749.03.

5. On February 28, 2007, this Court severed and transferred the cross-claims brought by Herklotz against two co-defendants.

6. On March 8, 2007, Herklotz filed a Notice of Appeal with the Clerk for the United States District Court for the Western District of Pennsylvania, and paid Appeal Fees in the amount of $455, for which Receipt #07003003 was issued.

7. On September 6, 2007, Herklotz filed his Appellant's Brief in the United States Court of Appeals for the Third Circuit.

8. On November 2, 2007, WRS filed a Motion for *Nunc Pro Tunc* Certification that Entry of Judgment is Final Pursuant to Federal Rule of Civil Procedure 54(b), requesting that the Court certify the judgment entered on February 20, 2007 as final. On February 8, 2008, the Court entered an Order certifying the finality of the judgment entered on February 20, 2007 as to John C. Herklotz.

9. The Court's February 8, 2008 Order retroactively certifies the February 20, 2007 as a final judgment in favor of WRS and against Herklotz in the amount of $2,584,749.03.

10. In its Memorandum Opinion dated February 8, 2008, in which the Court set forth its rationale for granting WRS's motion, the District Court notes that, "[b]ased on the Court's failure to file a separate order specifically entering judgment in favor of WRS and against Herklotz pursuant to Fed.R.Civ.P. 58, it appears that the judgment is not final. Therefore, unless the judgment against Herklotz is certified as final under

Fed.R.Civ.P. 54(b), his appeal of the Court's summary judgment orders is premature." (See Memorandum Opinion of the Honorable Arthur J. Schwab dated February 8, 2008, Attached as Exhibit A, pg. 15-16).

11. In consideration of WRS's motion under Fed.R.Civ.P. 54(b), this Court stated its reliance upon *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980), which sets forth that when making determinations under Rule 54(b), a district court must first determine that it is dealing with a "final judgment," in the sense "that it is a decision upon a cognizable claim for relief, and in must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" 446 U.S. at 7-8, *citing Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S.Ct. 895 (1956).

12. Secondly, the district court must determine whether there are any just reasons for delaying the appeal of an individual final judgment; in doing so, the district court "must take into account judicial administrative interests as well as equities involved." *Curtiss*, 446 U.S. at 7-8.

13. Taking this precedent into consideration, this Court decided that "[w]ith respect to the issue of finality, WRS's claim against Herklotz based on his separate personal guaranty of Plaza Entertainment's obligations to WRS is a cognizable claim for relief, and the judgment against Herklotz is final in the sense that it completely resolves the only claim asserted by WRS against Herklotz. *See Sussex Drug Products v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990), *citing*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988)…" (See Exhibit A, pg. 18).

14. The Court further found that there were no just reasons for delay in certifying the judgment against Herklotz as final under Rule 54(b). (See Exhibit A, pg. 18).

15. In support of this decision, the Judge Schwab reasoned that the WRS's claim against Herklotz, based on a personal guaranty executed solely by Herklotz, is "separate and distinct" from WRS's other claims against other parties based on a Services Agreement between WRS and Defendant Plaza. "[T]his is not a case in which disposition of various claims should be reviewed as a single unit." (See Exhibit A, pg. 18).

16. The Court also found that the equities weigh "heavily in favor" of certifying the judgment against Herklotz as final. (See Exhibit A, pg. 19).

17. Accordingly, it is clearly the Court's intent for its Opinion and Order dated February 8, 2008 to retroactively apply to its February 20, 2007 Order. The Court not only declares on February 8, 2008 that the judgment against Herklotz is final and appealable; the Court grants WRS's motion seeking *nunc pro tunc* certification that the February 20, 2007 judgment is final.

18. Further, it is unambiguous that the Court therefore certifies the judgment against Herklotz as appealable. In the Court's Memorandum Opinion dated February 8, 2008, Judge Schwab notes that following the February 20, 2007 Order entering judgment against Herklotz and the February 28, 2007 Order severing and transferring Herklotz's cross-claims as to the other remaining co-Defendants, Herklotz filed a Notice of Appeal to the Third Circuit, "[b]ased on a reasonable belief that the judgment entered against him was a final judgment." (See Exhibit A, pg. 13).

19. The Court's intent to retroactively treat the February 20, 2007 Order as final and appealable is further apparent from Judge Schwab's comments regarding judicial equity. In his Memorandum Opinion, Judge Schwab states,

> "Herklotz has been defending against WRS's claim based on his May 6, 1998 personal guaranty…for over seven years. A substantial judgment has been entered against Herklotz…and he is now in his 80's and his health is deteriorating. If the judgment against Herklotz is not certified as final and he is precluded from obtaining appellate review until all of the claims in the case are resolved, it is very likely that Herklotz will be compelled to suffer yet another lengthy delay in bringing his litigation with WRS to an end." (See Exhibit A, pg. 19).

It is unmistakable from this language that the District Court intends the February 20, 2007 Order to be treated as final.

WHEREFORE, Defendant John C. Herklotz respectfully requests that this Court, pursuant to Fed.Civ.R.P. 54(b) enter an Order modifying the Order of February 8, 2008, to expressly determine, *nunc pro tunc*, that the entry of Final Judgment as to John C. Herklotz was effective as of February 20, 2007.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

March 27, 2008
Date

By: *John P. Sieminski*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion for Nunc Pro Tunc has been served on counsel listed below by U. S. Mail delivery on this 27 day of March, 2008:

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